IN RE SIN LEE SANG SAWMILL SDN. BHD.

v.

LEONG THONG & ORS.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[COMPANIES WINDING-UP NO. 42-66-88]
21 AUGUST 1989

COMPANY LAW: *Winding up - Petitioners were minority shareholders but in control of management - Respondents were majority shareholders - Grounds - Oppression - Section 181 of the Companies Act - Whether just and equitable - Section 218(1)(i) of the said Act.*

The petitioners had petitioned for a winding up order against Sin Lee Sang Sawmill Sdn. Bhd. The petitioners were minority shareholders but had control of the management of the company. The three respondents were majority shareholders. The petition was based on serious grounds *inter alia* irregularities in accounts, company in serious financial difficulties and there were attempts to remove the petitioners as directors. The petitioners sought to rely on s. 181 of the Companies Act 1965 (i.e. oppression) as well as on s. 218(1) of the said Act (i.e. just and equitable).

Held:

[1] As it was the petitioners who were in control of the management of the company, they could not aver that the affairs of the company and the powers of the directors were being exercised in a manner oppressive to shareholders of the company under s. 181 of the Companies Act 1965.

[2] As the real purpose of the petitioners was to teach the respondents a lesson, this was not a case where the Court could grant the winding up order on the just and equitable ground under s. 218(1) of the Companies Act 1965.

[Petition dismissed with costs.]

Cases referred to:

Re Kong Thai Sawmill [Miri] Sdn. Bhd.; Kong Thai Sawmill [Miri] Sdn. Bhd. & Ors. v. Ling Beng Sung [1978] 2 MLJ 227
Re Senson Auto Supplies Sdn. Bhd. [1988] 1 MLJ 326

Legislation referred to:

Companies Act 1965, ss. 181, (1)(a), 218(1), (1)(i)

For the petitioners - V.S. Viswanathan; M/s. Kean Chye & Sivalingam & Teresita Antoinette; M/s. Almeida & Co.
For the respondents - Ng Chee Kong; M/s. Ng Chee Kong & Co.

JUDGMENT

Abdul Malek J:

The petitioners had petitioned for a winding up order against Sin Lee Sang Sawmill Sdn. Bhd. (hereinafter "the company") on the grounds that its accounts had not been lodged with the Registrar of Companies, that there were serious irregularities in the accounts, that

the respondents had manipulated the accounts, that the company was in serious financial difficulties and that the respondents were trying to remove the petitioners as directors of the company.

The company had been incorporated under the Companies Act 1965 (hereinafter "the Act") on 1 March 1983 with its registered office at 72 Market Street, Ipoh. It is not disputed that the petitioners had 64,749 shares in the company while the three majority shareholders Chong Thim, Chong Fook and Chong Sooi (the respondents) had 166,678, 41,125 and 41,125 shares respectively.

In their petition, the petitioners stated that although they were the minority shareholders, they had been the managing director and executive director respectively of the company since 1985. However, they maintained that Chong Thim and Chong Fook, as chairman and director respectively of the company and also being related to one another, had full management and control of the company.

The first petitioner had also averred that although he was the managing director, he did not get involved in the daily affairs of the company as he had to attend to his personal matters which was agreed to by all the directors. He also added that his daughter was working as a clerk for the company. The petitioners also alleged that two relatives of the other two directors were completely managing the business of the company. They admitted, however, to having signed the company's cheques.

The petitioners further stated that they had lodged a police report on 16 October 1988 as regards the non-accountability of about RM22,780.45 received by an employee of the company and that on 29 October 1988 had made a written complaint to the Registrar of Companies as regards the company not submitting the audited accounts. Although the company was trying to sell itself for RM600,000 to pay off its liabilities amounting to RM500,000, the petitioners allege that the respondents had refused the petitioners the opportunity to purchase the same at RM600,000.

The petitioners also allege that Chong Fook and Chong Sooi had acted in their own interests rather than in the interest of the shareholders as a whole and had in fact, at an extraordinary general meeting held on 16 October 1988, passed a resolution to remove the petitioners as directors but changed their minds when the petitioners had pointed out to them that the meeting had not been called in compliance with the Act.

It is relevant at this juncture to state that the petitioners had applied by way of an *ex parte* summons-in-chambers filed on 2 November 1988 for an order that the company be restrained from holding the extraordinary general meeting to be held on 9 November 1988 at 10 a.m. at the company's premises at SD9/1070, Jalan Menglembu, Ipoh with costs and this had been granted by the Court on 3 November 1989 with an order that there should be undertaking for damages, if any, to be sustained by the company as a result of the injunction.

Learned Counsel for the petitioners had submitted that the respondents, in their attempts to remove the petitioners, were intending to sanction all backdated transactions, conceal all misappropriations and falsify accounts to lower the value of its shares.

In reply, learned Counsel for the respondents argued that the grant of the petition would mean that the Court accepted the fact that the petitioners were in control of the company since 1985 and they would not have to answer for their misdeeds after the said order. The only issue, he contended, was who was in control of the company and accordingly referred to the affidavit of the petitioners filed on 4 April 1989 which had exhibited the agenda and

minutes of a directors' meeting held by the company on 12 April 1985 which had stated that the first petitioner had been appointed the sales manager and that both petitioners as director were authorised to manage and administer the company.

He agreed, however, that the company was in financial difficulties but the bank had only frozen its accounts in August 1988. He also submitted that the respondents could not manipulate its accounts when the directors other than the petitioners did not sign the cheques, vouchers and receipts. He added that the respondents had called for the Extraordinary General Meeting to get an explanation from the petitioners who could not satisfactorily explain to the auditors. If the petition was granted, Counsel said that the respondents would be left in the lurch in answering the auditors. Learned Counsel went on to say that since the respondents took over the management, the company had made profits.

Having perused the numerous affidavits and considered the submissions in the light of the Act, I fail to see how the petitioners, who I found to be in control of the management of the company, can even suggest that the affairs of the company and the powers of the directors are being exercised in a manner oppressive to shareholders of the company under s. 181 of the Act.

In Re Kong Thai Sawmill [Miri] Sdn. Bhd.; Kong Thai Sawmill [Miri] Sdn. Bhd. & Ors. v. Ling Beng Sung [1978] 2 MLJ 227 the Privy Council had declared that:

> For the case to be brought within s. 181(1)(a) of the Companies Act 1965 at all, the complainant must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possessed a majority of the voting power and, in reliance upon that power, made policy or executive decisions, with which the complainant did not agree, was not enough. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out. Similarly "disregard" involved something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure.

In the circumstances, the Court is also in no position to hold that this particular situation comes within the ambit of any of the provisions laid out in s. 218(1) of the Act. Again, reference is being made to the *Re Kong Thai Sawmill* case (4), *supra*, where it had been held that:

> The grant of winding up was in the discretion of the Court. In exercising this discretion the Court would have in mind the character of the remedy, if sought to be applied to a company which was a going concern; it would take into account *inter alia* the gravity of the case made out under s. 181(1) of the Companies Act 1965; the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; and the interests of other members of the company not involved in the proceedings. In this case the respondent had failed completely to make out a case for winding up the company.

In the event, I came to the conclusion that this was not a case where the Court could come to the opinion that it would just and equitable for the company to be wound up. On this point, I would make reference to *Re Senson Auto Supplies Sdn. Bhd.* [1988] 1 MLJ 326 where the headnote reads:

> The words "just and equitable" in s. 218(1)(i) of the Companies Act 1965 enable the Court to subject the exercise of legal rights to equitable considerations, that is to say, considerations of a personal character arising from one individual and another which may render it unjust or

inequitable to insist on legal rights or to exercise them in a particular way. Even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a *prima facie* case for relief, it will be refused if the real purpose of the petitioners is to obtain payment of money owed by the company. It is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the Court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith. In the present case there was inordinate delay in the presentation of the petition sufficient to debar the petitioners from relief by way of an order for winding up. The Court was not satisfied that the charges of oppression or discrimination were made out and neither was it satisfied that it would be just and equitable to wind up the company,;

which findings are also relevant to our case except the real purpose of the petitioners here, to my mind, was just to teach the respondents a lesson.

I had accordingly dismissed the petition with costs. As regards the injunction order given on 3 November 1988, although Counsel for the petitioners had submitted that no damages had been proved and Counsel for the respondents had asked for it to be set aside with damages to be assessed and to be payable by the petitioners, I had refused to make any order since there had been no formal application to set it aside.

Also found at [1989] 2 CLJ 1209